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Supreme Court of the United States

OCTOBER TERM, 1932

No. 194

ATLANTIC COAST LINE RAILROAD COMPANY and WILLIAM SMITH, APPELLANTS,

against

KATHERINE H. FORD, APPELLEE

BRIEF ON BEHALF OF APPELLEE

W. C. DAVIS,
Manning, S. C.,

J. W. WIDEMAN,
Washington, D. C.,

THE R. L. BRYAN CO., COLUMBIA, S. C.
12-6-32-40



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Errors in appellants' statement of case, and summary of facts:

(a) That there was not a scintilla of evidence on the five common law specifications of negligence.

(b) That all the required signals were properly given. (Not a single witness for appellant testified that **the bell was ringing or whistle sounding as the engine passed over the crossing;** the most the engineer and fireman would say "was that the air was turned on to ring bell," but neither said the mechanical device did its work, which is not sufficient under *Bamberg v. Railroad,* 72 S. C., 394).

(c) That, because Mr. Ford admitted giving his wife a little taste of liquor when she became nervous over the slippery roads, some broken fruit jars at the scene of the collision, and the incoherent mumblings of two people just after regaining consciousness, it was **clear** the Fords were under the influence of liquor.

It is our understanding "that all questions of fact were settled by the State Courts" (*Hendrix v. Railroad Co.,* 167 U. S., 673-677, 17 Sup. Ct., 922, and cases cited in the opinion), and however sneeringly and unjustly appellant may have characterized appellee's testimony, the fact is the jury has resolved these questions of fact against it, and it appears to us that appellants' grievance, throughout this whole case, is rather against the jury than against the law.

BRIEF

Appellant contends that our crossing statute (R., pages 151-2), violates the due process and the equal protection clauses of the 14th amendment and the Interstate Commerce Clause of the Federal Constitution.

So much has been said as to our Court's construction, interpretation and application of this statute, that it might be of aid to the Court to point out at the very outset of this argu-

ment the propositions of law the appellants and appellee are apparently agreed upon, and then those whereon we disagree.

Points of Law Urged by Appellants that We Agree Upon

(a) That the final constructive and prevailing view of a State statute (not a few isolated and ill considered expressions in some of the earlier cases), by the highest Court of the State are to be considered just as much a part of it as if actually expressed in the text.

(b) That it has been uniformly and repeatedly held in our State that a neglect to give the signals prescribed in Section 4903 is negligence *per se*.

(c) That in a suit under Section 4925 the mere failure to give the signals is not recklessness, wantonness, or willfulness *per se*, so as to warrant an award of punitive damages, but that the reasonable inference from such failure was sufficient to carry that issue to the jury for its determination.

(d) In a suit under the conditions set out in Section 4925 a failure by the railroad to give the required signals is presumed to be the proximate cause of the injury, and to warrant recovery by plaintiff in the event the defendant offers no testimony.

(e) That the burden of proof, notwithstanding the presumption, remains on plaintiff throughout the trial to show a case of actionable negligence.

(f) That Section 4903 is a valid exercise of the police power of the State and its constitutionality must be sustained, notwithstanding its direct effect upon trains employed in interstate commerce.

(g) That in our State one about to cross a railroad at a public crossing is not under the absolute duty to stop, look and listen before going on the track, unless the exercise of ordinary care and prudence, under all the surrounding facts and circumstances, requires the adoption of such a course, and therefore the supposed standard of conduct laid down for the traveler in *B. & O. Railway Company v. Goodman*, 275 U. S.,

66, is not followed there, however much our Court respects the decisions of this Court.

(h) That this statute is not applicable to engineer through whom it acts, and he can only be held liable at common law, and to whom all his common law defenses, including contributory negligence on the part of plaintiff, are still available.

(i) That this statute is not applicable to all common carriers.

(j) That it is not beyond the power of the State, in the absence of congressional action, to require the faithful and prompt performance of duty within its limits, and the exercise of that power is in aid of commerce and does not burden it though incidentally affecting it.

(k) That under Section 4925 the traveler is not held guilty of contributory negligence unless the defendant company makes it appear that in addition to the mere want of ordinary care he has been guilty of gross or willful negligence or a violation of law.

Points of Law Urged by Appellant Upon Which We Do Not Agree

(a) That Section 4925 raises arbitrary and unreasonable presumptions and allows plaintiff to recover thereon without proving proximate cause.

(b) That the presumption arising from the failure to give the signals continues throughout the case and is to be weighed against opposing evidence.

(c) That no Circuit Judge under the decisions of our Court can now direct a verdict for the defendant.

(d) That there is no causal connection between the failure to give the signals and the injury.

(e) That the *prima facie* presumption of proximate cause is not in fact rebuttable under our decisions.

(f) That the rights of the railroad are superior to those of the traveler at a grade crossing.

(g) That our statute requires the train to stop.

(h) That the railroad has no action over against the engineer who caused the collision.

(i) That the statute is unconstitutional because it casts upon each defendant a different duty thereabout, and because a different rule of law is applied as measuring the liability of the two separate defendants.

(j) That the trial Judge overruled motion for directed verdict solely by reason of this Court's decision in the *Turnipseed case.*

(k) That in all actions *ex delecto* in this State there must be proof of proximate cause **except** in collision cases at crossing where a railroad is defendant.

(l) That the plaintiff is required to produce no evidence whatever on the question of negligence or on the question of proximate cause.

(m) That the construction placed upon the statute (Section 4925) by our Court practically insures a recovery by a plaintiff in damage suit for a crossing collision and bears no resemblance to a proper safety regulation.

(n) That under our statute and decisions the presumption can be rebutted **only** by the affirmative defenses of willful conduct and violation of law on the part of plaintiff at time of collision.

(o) That the rebutting evidence of defendant is not, and cannot be, offered as to proximate cause but is addressed solely to the giving of signals.

(p) That in reaching a verdict under this South Carolina statute, the jury does not weigh evidence of actionable negligence offered on the part of plaintiff against evidence of no such negligence offered on the part of the defendant, because the plaintiff is not required to show that the acts of which he complains constitutes either negligence or the proximate cause of the injury.

(q) That proximate cause is not a fact which is subject to inference or presumption, but it must be proved by plaintiff (presumably by positive or direct testimony and not by inferential or circumstantial).

(r) That by the decisions of the State Court it has, in effect, declared that the traveler always has the right of way.

(s) That the statute on its face and as construed by State Court in fixing entirely different rules of liability for the railroad and the traveler on the highway with respect to accidents at crossings, attempts a wholly arbitrary and unreasonable classification.

(t) That Sections 4903 and 4925 as construed by State Court, violate the interstate commerce clause.

Now our chief construction of statute concerns as to the final constructive and prevailing view of the State Court upon this statute, every phase of which, during the nearly fifty years since its passage, has been considered and construed by the Court, and thereby this Court can readily see whether the law we do not agree upon is as contended for by appellant.

We get this final constructive and prevailing view of the Court in the leading case of *McBride v. Railroad Company,* 140 S. C., 260, and which has been followed ever since, in which Justice Stabler, in a clear and able opinion, reviews the earlier cases and lays down the following as the correct view of the statute:

1. The signal statute, as shown by its title, is a regulation for the prevention of accidents and concerning responsibility therefor. The Legislature evidently had in mind that injury to property or person was very likely to occur at a railroad crossing unless proper warning of the approach of trains was given to travelers, and intended by the statute to prevent such injury by requiring the railroad to give such definitely described signals.

2. Under the statute a plaintiff must make it appear: (1) That an injury occurred at a crossing; (2) That there was a failure to give the statutory signals; (3) That such failure contributed to the injury.

(3) In construing the statute this Court has held: (1) That the word "contributed" in the statute means contributing as a proximate cause of the injury; and (2) that failure to give the statutory signals creates a presumption that such failure

caused the injury, unless the testimony shows that the injury was caused in some other manner.

"Under the statute it must appear that the failure to give the signals contributed to the injury, and the decisions of this Court holds that this means contributing as a proximate cause. It does not necessarily follow, however, that the causal relationship must be shown, in the first instance, by evidence, since, as in other cases, a presumption, if reasonable and well-founded, may arise from the proven facts. The rule as to causal relation between the violation of the statute and the injury is clearly stated in 20 R. C. L., at page 43, as follows:

> " 'The meaning of proximate cause in this connection has been explained as follows: If the injury complained of is a natural and probable consequence of a violation of the statute, then that violation is correctly taken as the proximate cause of the injury. If the very injury has happened which was intended to be prevented by the statute law, that injury must be considered as directly caused by the non-observance of the law. But if the injury is one that happened by causes independent of the violation of the statute, it is not actionable on the basis of that violation.'
>
> "From our consideration of this question, we are satisfied that the proper construction of the statute leads to the conclusion that when a person is injured by a collision with the engines or any car or cars of a railroad corporation at a crossing, and the railroad failed to give the statutory signals at such time and place, the presumption arises that the failure to give the signals is the proximate cause of the injury, since such injury is the natural and probable consequence of the failure to give the signals and is the very injury intended to be prevented by the statute. It must be borne in mind that this presumption does not mean that the casual relationship between the failure to give the signals and the injury is shown conclusively. The presumption merely establishes a *prima facie* case, which may be overcome by testimony, whether

given for the plaintiff or for the defendant. This was made clear in the *Strother case;* and later, in the *Drawdy case,* it was held that the presumption in favor of the plaintiff was overcome by the testimony in favor of the defendant."

This well-considered case of *McBride v. A. C. L. Railroad Company* has been followed in the recent cases of *Brogdon v. N. W. Railroad Co.,* 141 S. C., 238; *Glenn v. Southern Railway Co.,* 145 S. C., 41; *Whitehead v. A. C. L. Railroad Co. et al.,* 153 S. C., 339, and we feel satisfied that a careful reading of the entire record will show that the presiding Judge followed the principle as laid down in these cases.

4. An affirmative avoidance of liability under the statute is concisely but comprehensively stated by Mr. Chief Justice Blease in the case of *Glenn v. Southern Railway Company,* 145 S. C., 48, 49, in this language:

"Under the specific terms of the signal statute, the common-law defense of contributory negligence is eliminated from our consideration. The language of the statute (Section 4925, Civil Code 1922), is that, if the failure to give the specified signals contributed to the injury, liability for all damages caused by the collision is imposed upon the railroad company, unless, 'in addition to a mere want of ordinary care,' it is shown that gross or wilful negligence or unlawful act, chargeable to the person injured, contributed to the injury. Negligence signifies inattention, or, in other words, an unconscious failure to realize the danger of the situation. Willfulness signifies conscious disregard of consequences. The term 'gross negligence' does not stand by itself in the statute, but the context characterizes the meaning and gives it the significance of willfulness. This was the construction given in *Boyd v. Railway,* 65 S. C., 326, 43 S. E., 817, to the use of the same term in the charge of the trial Judge, where, from its connection with the other language used in the charge, Mr. Justice Woods said that the meaning must be understood 'that it was not simply

> gross negligence, but negligence gross and reckless of consequences to such degree as to assume the nature of willfulness.'"

It is, therefore, quite evident that appellants' contention under the supposed authority of the cases of *Cirsosky v. Smathers*, 128 S. C., 358; *McCown v. Muldrow*, 91 S. C., 523, and *Whaley v. Ostendorf*, 90 S. C., 281; all of which were decided before the *McBride case*, to the effect that in this State in all cases *ex delicto* there must be proof of proximate cause except in collision cases at a crossing where a railroad is defendant, is in direct variance with the conclusion reached in the *McBride case*.

It is alleged the statute attacked does not afford due process of law, in that it raises arbitrary and unreasonable presumptions and allows the plaintiff to recover thereon without proving proximate cause.

In discussing this feature of the attack on our statute appellants' ingenious and able argument would be almost irresistible if it wasn't based on false premises.

A great deal of time and labor is spent in showing the Court that in all actions *ex delicto* and under the statute the proof of causal connection or proximate cause is essential to recovery. We admit this, and our Court so holds in the *McBride case* and all the cases following in these words:

> "Under the Statute it must appear that the failure to give the signals contributed to the injury, and the decisions of this Court hold that this means contributing as the proximate cause."

We also admit here and now that the burden of doing so never shifts from the plaintiff to the end of the case, notwithstanding the berated presumption.

We think when this Court comes to consider appellants' argument (pages 21-51), it will find it is based upon the following errors:

1. That under Section 4925 there is a presumption of **both** negligence *per se* and the proximate cause of the injury.

2. That proximate cause can be proven only affirmatively and presumably only by positive and direct testimony, and that inferential or circumstantial is excluded.

3. That proximate cause is not a fact which is subject to inference or presumption.

4. That although our Courts have said time and time again that the presumption as to proximate cause is rebuttable, and may be overcome by testimony for the plaintiff or the defendant, and don't even arise if testimony shows injury was caused in some other manner, because our Court hasn't used the words, upon the coming in of such testimony, "that the *prima facie* presumption vanishes," it remains there to be weighed as evidence.

5. That the testimony offered by defendant in rebutting the presumption of proximate cause is, and can only be, directed to showing that bell was rung or whistle blown, **and not to the particular point to which the presumption relates.**

6. That our Courts under the present state of the decisions **cannot** direct a verdict for plaintiff, thus saying the alleged arbitrary presumption has been overcome, or that the plaintiff was responsible for the accident, and this can't be due process.

7. That the only defense of defendant to plaintiff's cause of action under this statute is the gross, willful negligence of plaintiff or his violation of law, contributing to his injury, and therefore he hasn't a fair opportunity to repel the presumption raised against him.

8. That there is not only no rational connection but **no connection at all** between the failure to give signals and an injury to a man suffering from some physical disability that would prevent him availing himself of the warning given by the signals.

9. That the statute here under attack declares a **rule of liability** that has been adopted as a matter of convenience, and is not a rule of evidence.

Had our Courts never said a word about this presumption—in fact, if we had no statute on injuries at highway crossings, and the suit was wholly at common law, we maintain the verdict and judgment in this case should stand; and it must do so even by the rule laid down by Justice Cothran in his dissenting opinion in the *McBride case* and presumably by appellants who rely so largely upon it.

At the foot of page 294 of this dissenting opinion in *McBride case,* Justice Cothran points out what a plaintiff should prove to meet the duty of proving proximate cause, in these words:

> "At the least he should be required to show that he did not know of the train's approach, and that this situation was such that if the signals had been given he would have been notified of it."

In the case at bar plaintiff proved (at least offered testimony to prove):

1. That the defendant ran over and injured her at a public crossing, which she had the legal right to travel, although in plain view of its engineer and fireman for at least five hundred yards or more.

2. That there was a failure to give the signals required at common law or by Section 4903 (contended by appellants to be entirely separate from Section 4925 in which the presumption arises, and which may be considered in this connection).

3. That such failure contributed to her injury as the proximate cause in that, according to Justice Cothran:

> "(a) Neither her husband, the driver, or herself **knew of the train's approach** directly from their rear, notwithstanding they both looked and listened as best they could in a car with curtains up, the morning dark and rainy, a silently running motor and the car almost stopped, the reason for not hearing train given 'that on wet rails a train approaching one makes very little noise and what noise is made is carried to the rear of train and away from you'; the reason for not seeing being 'the dark rainy morning, his confusion of mind from two highways intersecting on the railroad right of way, cars coming and

going, a neighborhood road near by, and looking at directions on detour sign on railroad right of way.' (R., 7, 8, 9, 10, 11, 18, 21, 24, 28, 29).

"(b) **That this situation was such that if the signals had been given she would have been notified of it.**

"All witnesses, except occupants of car, heard the signals at the 500 yard post, but not a single witness testifies that as the train aproached the crossing the signals required by Section 4903 were given in the manner required, or if measured by reasonable care alone, that some other signal than that 500 yards away was given when defendant saw or should have seen plaintiff was going on the crossing. If, as strenuously contended by appellant, the train was in plain view of plaintiff then it necessarily followed that plaintiff's car was in plain view of appellant's engineer and fireman, and not the slightest testimony that any effort was made to check speed of train, when only the slightest checking of the momentum of train (only the rear of car being struck) would have saved plaintiff."

Be all this as it may, the driver of the car and the plaintiff swear **that their situation was such, that had any warning been given as the crossing was approached by train, the car could have been stopped in half its length, and that unless they had wanted to commit suicide they never would have gone on crossing.** (R., 9, 10, 107, 108).

If this doesn't make out a case of actionable negligence at common law regardless of Section 4925—if it does not make out a case of actionable negligence under the statute without any use whatsoever of a presumption—then we must admit that we don't know how to get a tort case to the jury.

But to get back to appellants' false premises.

(1) That under Section 4925 there is a presumption of **both** negligence *per se* and the proximate cause of the action. What is the act of negligence *per se?* The violation of the statute law of the State. It is so declared not because of any

presumption, but because it is in full accord with the general rule of law established in a great majority of the jurisdictions in this country.

20 R. C. L., pages 38, 39.

This act of negligence *per se* is not established by the presumption but by direct and positive testimony.

But when all our decisions declare that the presumption refers to the causal connection only, the proximate cause, it is beyond us to understand how appellants hope to successfully maintain before this Court that there are two presumptions under the statute.

McBride v. Railway, supra; Brogdon v. Railway, 141 S. C., 238; *Glenn v. Railway,* 145 S. C., 41; *Bowers v. Public Service Corporation,* 148 S. C., 161; *Edwards v. Railway,* 148 S. C., 266; *Stabler v. Railway,* 160 S. C., 191.

The argument of appellant at pages 21 and 41, in his zeal to show a non vanishing presumption, to bring our statute in juxtaposition with the Georgia statute, condemned in the *Henderson case,* possibly is explanatory of the necessity of arguing that under our statute presumptions are raised of **both** the act of negligence *per se* **and** the proximate cause.

If the statute required, or our Court held, it was necessary to use the presumption to establish the act of negligence of law violation **(established by positive and direct testimony and which of course cannot vanish throughout the trial),** then there might be some force in appellants' argument "that under our Statute the presumption never vanishes," and is necessarily weighed by the jury against the testimony of defendant, and thus bring it within the condemnation of the Georgia statute under the *Henderson case.*

Appellant says this is the crux of the whole matter.

It might be well just here to call the Court's attention to a point in connection with the arising of this presumption, which appears to have escaped the attention of all the lawyers in the case up to this point. Justice Stabler in the *McBride case* at page 208 says, that our Court in construing the statute has held:

"(2) That failure to give the statutory signals creates a presumption that such failure caused the injury, **unless the testimony shows that the injury was caused in some other manner.**

"It seems to us that there is here a clear implication that the rebuttable presumption never arises **when the testimony shows the injury was caused in some other manner."**

And for all we know the presumption may have never arisen in this case in the first instance, for upon the testimony of the engineer, Smith (R., 50-52), alone, the jury's verdict can very properly be based upon the common law allegations of failing to keep a proper lookout and failure to stop before the collision.

Let us see what this Court meant in the *Turnipseed* and *Henderson cases* by a "vanishing presumption," and what the Circuit Court of appeals meant in *Kirsh v. A. C. L.*, 38 Fed., 2, 963, where the Court was considering an exact copy of the Georgia statute on appeal from a district court of Florida, when it said, "the uniform construction of the Statute by the Supreme Court of Florida is that it merely creates a presumption 'that disappears and comes to an end' upon the submission of proof by a railroad company . . ., for we must admit it has given us considerable trouble."

In 16 Cyc., at pages 1050 and 1051 it is said:

"Generally considered, a presumption of fact is that mental process by which the existence of one fact is infered from proof of some other fact. It is inseparable from inductive reasoning as an inference of the unknown from proof of the known." . . .

"It is based on facts, not on presumptions. No inference of fact should be drawn from premises which are uncertain. Facts (the failure to give signals) upon which an inference may legitimately rest must, is is said, be established by direct evidence as if they were the very facts in issue. One presumption cannot be based upon

another presumption." (The very thing done in the *Henderson case.*)

"It is an assumption made by the law that a strong inference of fact is *prima facie* correct, and will therefore **sustain the burden of evidence,** until conflicting facts on the point are shown. When such evidence is introduced, the assumption of law is *functus officio* and drops out of sight. The inference of fact which has been assumed to be correct continues to have its legalized weight in the case.

16 Cyc., 1073.

"The matter is now a little clearer to us, and we recall how time and time again we have heard our judges in charging juries, say: Gentlemen of the jury, if you find the letter in question was mailed there is a presumption that it was received—or, the law presumes that a minor over seven and under 14 years of age is incapable of committing a crime—both of these presumptions, however, may be rebutted, and I charge you that when all the facts and circumstances are in evidence, 'presumptions, like the Arabs, silently fold their tents and steal away.' "

So then when this Court in the *Henderson case* said:

"That legislation declaring that proof of one fact (violation of signal statute) or group of facts shall constitute *prima facie* evidence of an ultimate fact (proximate cause of injury), is valid."

appellant is driven to desperate lengths when he must convert the negligent act (violation of statute), established by evidence, into a presumption, and argue that our statute must fall under same condemnation as the Georgia statute—construed as it was by the Georgia Court—because you cannot base a presumption upon a presumption—and if you did the presumption would necessarily be weighed against opposing evidence, and therefore run counter to the rule laid down by this Court on this matter.

We are not surprised then, with appellants' misapprehension of the office of the presumption, and his insistence that it is

itself "evidence," that he insists, in charging the last sentence in appellee's 4th request to charge (R., page 130), the Court necessarily permitted the presumption to be weighed against opposing evidence when he used these words: "**All** the **evidence** must be considered in determining the question of proximate cause."

We will proceed now to consider together the second and third errors of appellants shown by his argument, to wit, that proximate cause can be proven only affirmatively and presumably only by positive and direct testimony, and that proximate cause is not a fact which is subject to inference or presumption.

We have never heard before that **any fact** could not be established by inferential or circumstantial evidence as well as by direct and positive. Indeed, it is difficult for us to understand how in many actions *ex delicto,* you can prove proximate cause by direct or positive testimony. Let's go into the actual trial of this case. Plaintiff and her witnesses testify that the signals were not given or that they did not hear them and were in such a position that they could have done so if they had been given. All of the facts surrounding the occurrence are detailed. Then the plaintiff or any witness is asked by counsel what caused her injury? Distinguished counsel for appellants would immediately object, and be sustained by the Court upon the ground that that would be a matter of opinion, let her detail the facts and the jury will draw the conclusion.

Not a single case cited by appellants (page 42 of Argument) supports this position. The *Toops* and *Harris cases* arose under the Federal Employers' Liability Act, **a matter Congress has taken entire jurisdiction over,** and is authority for the proposition that causes under that Act are tried under the common law rules of evidence and is not subject to local law. Under that Act negligence is an affirmative fact which plaintiff must establish. What emphasizes their inapplicability to the point under consideration is, that when plaintiff sought in the *Harris case* to use the Mississippi *prima facie* Act (about which so much is said in this case), to prove negli-

gence, this Court said no, clearly because a cause under a Congressional Act is governed by the rules of the common law.

The *Patton case* holds that the fact of an accident to an employee raises no presumption of negligence on the part of the employer as in case of injury to passenger; it is an affirmative fact for the injured employee to establish that the employer has been guilty of negligence (no quarrel with this proposition).

The *Sweeney case* is authority for proposition "that the doctrine of *res ipsa loquitur* does not have the effect of shifting the burden of proof so as to make it necessary for defendant to overcome the presumption of negligence by a preponderance of evidence that there was an absence of negligence on his part, **but defendant is called upon for explanation or rebuttal."**

The *Coogan case,* another action under the Employers' Liability Act, holds, in accordance with our understanding of the law, that circumstances relied on to prove a fact must be proved, and cannot be presumed.

None of these authorities support the position that proximate cause is not a fact which can be proved by inferential or circumstantial evidence, even at common law, and the proposition cannot be correct. Otherwise what this Court said in *Adams v. N. Y.,* 192 U. S., 585:

> "Legislation providing that proof of one fact (the failure to give signals) shall constitute *prima facie* evidence of the main fact in issue (the proximate cause of injury) is but to enact a rule of evidence, and quite within the general power of government. Statutes, National and State, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous," would be meaningless.

Again in the case of *Insurance Company v. Weide,* 78 U. S., 438, the Court, discussing this question, said:

> "It is well settled that if the evidence offered conduces in any reasonable degree to establish the probability of the fact in controversy, it should go to the jury. It would be

> a narrow rule, and not conducive to the ends of justice, to exclude it on the ground that it did not afford full proof of the non-existence of the disputed fact. Besides, presumptive evidence proceeds on the theory that the jury can infer the existence of a fact from another fact that is proved, and most usually accompanies it. Many of the affairs of human life are determined in Courts of justice in this way, and experience has proved that juries, under the direction of a wise Judge, do not often err in the reasoning which leads to a proper conclusion, the Court has in its own hands the mode and measure of redress."

Look now at the fifth false premise, and I believe here is the main reason why appellants can see "no good thing come out of Nazareth":

If appellant in its many jury trials under the statute addresses its testimony **solely** to showing that bell **was** rung or whistle blown, and doesn't concern itself in rebutting the alleged *prima facie* established proximate cause, we can easily understand the loss of a majority of its cases and the berating of the jury's verdict as capricious.

In the relied on *Henderson case,* this Court said:

> "A *prima facie* presumption casts upon the person against whom it is applied the duty of going forward with his evidence **on the particular point to which the presumption relates."**

What is the particular point to which the presumption relates? Clearly to the proximate cause—the causal connection between the alleged act of negligence and the injury. Now how should defendant rebut that? He can offer under his general denial even, testimony to show that in fact the signals were given, as was done in this case. But that doesn't rebut plaintiff's case—that isn't the main point in issue—that isn't the thing to which presumption relates—that is the fact it operates on. Defendants testimony should be directed **to showing that the alleged proximate cause in fact had nothing to do with her injury;** that even had the signals been given,

nevertheless plaintiff would have been injured from some other cause, or from her own gross and willful conduct or from the violation of some law.

With appellants' idea that his rebuttal testimony is directed solely to the giving of signals, this Court can easily understand why appellant fell into the error of believing that his requests to charge, 4 and 5 (page 23 of its argument), were good law. The Court sees at once that request 4 is right in the teeth of the statute, and that the words "as soon as the railroad company introduced evidence **rebutting plaintiff's evidence that the signals required thereby (the statute) were not properly given for the crossing involved in this suit,** the temporary inference completely vanished etc.," could not be given by the Court.

Even if the trial Judge should have used the words "completely vanished" in connection with the presumption to save the statute, instead of telling jury the presumption was not a conclusive presumption and could be rebutted, as he did do in charge, yet the proposition as presented in 5th request to charge contained two propositions of law, one that may or may not be good, and the other certainly bad, and under the rule announced in *Sweeney v. Erring,* 228 U. S., 233, the Court was justified in refusing to charge it.

If these two requests to charge contained the standard of conduct laid down in the *Goodman case,* appellant certainly was not entitled to have them charged under our law.

The fourth false premise needs very little discussion to show its utter futility in upsetting a statute of a State designed for the safety of its citizens.

4. That although our Courts said time and time again that the presumption as to proximate cause is rebuttable and may be overcome by testimony for the plaintiff or the defendant, and impliedly that it doesn't even arise if testimony shows injury occurred in some other manner, yet because our Court hasn't used the words upon the coming in of such testimony "that the *prima facie* presumption vanishes," it remains there to be weighed as evidence.

Our *en banc* Court in this case says at top of page 172 of the record:

> "Not a single case brought to our attention by attorneys for appellants and relied on in support of the proposition, sustains the characterization of the disputable presumption arising under the crossing statute to the effect that it remains 'throughout the entire case' and is to be weighed as opposing evidence in fixing liability.
>
> "In the cases cited the cases of *McLeod v. Railroad Company,* 95 S. C., 71, and *Thompson v. Railroad Company,* 113 S. C., 261, involved injuries to passengers; the cases of *Matthews v. Railroad Company,* 98 S. C., 204; *Ervin v. Railroad Company,* 106 S. C., 354, and *Perryman v. Railroad Company,* 105 S. C., 34, injuries to stock, and the cases of *Baker v. Telegraph Company,* 57 S. C., 174 and *Glenn v. Railroad Company,* 96 S. C., 357, did not relate to this presumption as they were decided before the case of *McBride v. Railroad Company, supra,* in which case the presumption was defined."

Appellant at foot of page 26 of argument admits this, but says "that the action of the Court in every such case compels the conclusion that such is the effect of such presumption" and then contends that his assumption is true because the presumption does not vanish if **no testimony** is offered by defendant—hence it can't vanish when testimony is offered, notwithstanding this Court in the *Turnipseed case* said:

> "When that is done (defendant offers testimony) the inference is at an end and the question of negligence is one for the jury upon all the **evidence** (not the presumption). **In default of such evidence,** the defendant, in a civil case, must lose, **for the prima facie case is enough as matter of law."**

Appellants' trouble here again is an error formerly pointed out, to wit, that he has misapprehended to what the presumption relates, otherwise he would know that our Court cannot charge on the facts, and tell the jury that the proximate cause

has or has not vanished, what is the proximate cause being always for the jury.

To declare upon such reasoning, a State statute and our Court impinges upon grave constitutional provisions, shows an utter disregard for the rule laid down by Chief Justice Waite in *Sinking Fund cases,* 99 U. S., 718:

> "Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown **beyond a rational doubt."** If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive . . . the appeal must be to the Legislature, or to the ballot box, not to the judiciary."

We take up now appellants' sixth false premise:

6. That our Courts under the present state of the decisions cannot direct a verdict for defendant, thus saying the alleged arbitrary presumption has been overcome, or that plaintiff was responsible for the accident, and this can't be due process.

A sufficient answer to this is that our Court in the *Strother, McBride* and other cases said "the presumption could be overcome by testimony for the plaintiff or the defendant, and in the *Drawdy case,* it was held that the presumption in favor of plaintiff **was** overcome by the testimony for plaintiff even, and he was nonsuited.

Moreover, the very authority cited by appellant (*Whitehead v. Railroad Company,* 153 S. C., 339), to sustain this position shows it incorrect. The Court there said:

> "Such presumption may be overcome by evidence, but whether or not such presumption was overcome by evidence, is as a general rule a question for the jury."

And proceeds to state that the trial Judge should refuse to submit case to jury when there was no conflict in testimony, and when it shows it was due to plaintiff's own misconduct.

See also authorities cited by Court (R., page 149), as to when a question becomes issuable in our State and must be submitted to jury, and the rule observed in viewing the testimony on motion for nonsuit, directed verdict or new trial.

It is the duty of a trial Judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury may draw therefrom would be insufficient to support a different finding.

Baltimore & Ohio R. R. Company v. Graeger, 266 U. S., 521; *Chicago M. & St. P. Railway Co. v. Coogan,* 271 U. S., 572.

Seventh false premise: That the only defense of defendant to plaintiff's cause of action under this statute is the gross willful negligence of plaintiff, or his violation of law, contributing to his injury, and therefore he hasn't a fair opportunity to repel the presumption.

These are defendants affirmative defenses.

Our Court at page 176 of the record points out the ridiculousness of this position:

> "A zealous effort to bring the statute under the denunciation of the *Henderson case,* which seems to be erroneously placed in this contention in a relation of judicial rivalry with the imputed infirmities of the *McBride case* in joint condemnation, leads the appellant into the wholly untenable position that the company in rebuttal of the plaintiff's case, is confined to the two affirmative defenses of willful conduct or a violation of the law by the plaintiff at the time of the collision.
>
> "The fact can scarcely be deemed controversial that the presumption does not in the least preclude the company or cut it off from a fair opportunity of bringing forward all competent and relevant testimony arising out of and surrounding the transaction and of such evidentiary force as tends to negative the fact or inference of proximate cause, regardless of the conduct of the plaintiff. It may be true that in many cases such testimony would incidentally establish contributory fault on the part of the plaintiff or his agent, but the defendant is not confined to such evidence if other testimony is afforded by the occurrence, nor is it logical to conclude that if such testimony has the two-fold effect it must become as a matter

> of law so closely assimilated and confined to the one as legally to exclude it as relevant and competent testimony tending to negative the other."

We look upon the eighth false premise as the only one warranting serious consideration by us or this Court, and if we can show this Court a rational connection between the act of negligence (failure to give signals) and the injury, then appellant has no case, for beyond question the want of this rational connection was the main ground upon which the *Henderson case* turned.

8th. That there is not only no rational connection **but no connection at all** between the failure to give signals and an injury to a man suffering from some physical disability that would prevent him availing himself of the warning given by the signals.

We may remark at the outset that the mere fact that McBride and Strother, the former because of an epileptic fit, and the latter because of noise from his machine, could not have availed themselves of the warning if signals had been given, and therefore not entitled to the presumption arising from such failure, is no reason for declaring a statute a denial of due process, passed for the protection of **all persons** who **can** avail themselves of the required warning. Certainly no such physical incapacity was shown in the case at bar.

Appellants' argument on this point is based so largely on the *Henderson case,* the alleged analogy of the Georgia statute to ours, as construed by the respective Courts, that we want at this point to earnestly ask this Court to read carefully the clear, forceful, and we may say, with pardonable pride in the judiciary of our State, the very able and elaborate opinion of Acting Associate Justice Smith found between pages 164 and 184 of the record, in which he so lucidly distinguishes the case at bar from the *Henderson case*—the Georgia statute from our statute—and points out the analogy between the *Turnipseed case* and this case—the Mississippi statute and ours.

It might be well for us to state at this point, however, our

understanding of what was really decided in the *Henderson case,* and that is this:

1. That the presumption arising under the Georgia statute covered too much territory—if the Court will pardon the slang—not only that defendant and its employees were **negligent** in **each** of the **particulars alleged**, many of them contradictory, and five of them not having a scintilla of evidence to support them, but **that every act or omission** in plaintiff's specifications was the proximate cause of the death.

2. That it made defendant liable, **in the absence** of evidence on the part of plaintiff, unless it showed due care in **respect of every matter alleged against it.**

3. That **in the absence** of evidence, the Court necessarily permitted the presumption to be weighed against evidence of defendant tending affirmatively to prove that the operation of train was not negligent in any respect.

4. That the mere fact of collision between a railway train and a vehicle at a grade crossing furnished no basis for any inference as to whether the accident was caused by the negligence of the railway company, or of the traveler, or of both, or without fault of any one.

5. The presumption was used to support **conflicting allegations of negligence.**

6. Notwithstanding these arbitrary presumptions this Court said:

> "Legislation declaring that proof of one fact or group of facts shall constitute *prima facie* evidence of an ultimate fact in issue is valid, **if there is a rational connection between what is proved and what is to be inferred.** A *prima facie* presumption casts upon the person against whom it is applied the duty of going forward with his evidence **on the particular point to which the presumption relates.** A statute creating a presumption that is arbitrary, **or that operates to deny a fair opportunity to repel it,** violates the due process clause . . . (Emphasis added).

It seems to us then, under this announced view of the Court, that just two things determine whether our crossing statute is arbitrary and therefore unconstitutional as a denial of due process, to wit:

(a) Is there a rational connection between what is proved (failure to give signals and injury) and what is to be inferred (the causal relation between the two proven facts, or proximate cause)?

(b) Has the defendant a fair opportunity to repel this presumption?

We have already commented on the latter essential in considering one of the other errors of appellants, and will now address our attention to the former.

Let us not forget that nearly fifty years ago, long before the *McBride case,* Justice McGowan, speaking for the Court in the case of *Kaminilsky v. Railway,* 25 S. C., 53, where a similar question was evidently raised, said:

> "We do not, however, consider that by the aforesaid provision (proof of negligence from a mere failure to give signals) the main object of the Legislature was to make a change in the law of evidence, **but to induce compliance with the previous requirement as to signals.** The rule of evidence as to negligence was made to apply **only** in case of failure to give the required signals, and it is manifest that the purpose was to give **an additional sanction** to the provision requiring the signals to be given."

Again, Chief Justice Gary in *Drennan v. Railway,* 91 S. C., 504, the only other case prior to this one, in which these constitutional questions have been raised in our State since the passage of the Act around fifty years ago, after approving the language of the Court in the *Kaminilsky case,* said:

> "One reason for the change in the rules of evidence (evidently referring to the higher degree of contributory negligence to defeat plaintiff) by Section 2139 (now 4925) of the Code of Laws is, that in many instances the party colliding with the train of cars, is instantly killed,

and the Railroad Company would have a decided advantage, if it was only required to prove that the person injured was guilty of ordinary contributory negligence. The necessity of the case requires proof of more than ordinary negligence on the part of the person injured. A like necessity caused a change in the rules of evidence where cattle were killed by train, as will be seen by the case of *Danner v. Railway,* 4 Rich., 329, in which it was held, that there was a presumption of negligence arising from the mere act of killing the stock."

So then there is a reasonable ground or basis for the statute and its presumption when Justice Stabler says, at foot of page 273, *McBride case:*

"The signal statute, as shown by the title to Article 7 of the Code, is a regulation for the prevention of accidents and concerning the responsibility therefor. The Legislature evidently had in mind that injury to person or property was very likely to occur at a railroad crossing unless proper warning of the approach of trains was given to travelers, and intended by the statute to prevent such injury by requiring the railroad to give certain definitely described signals."

Our Court in contrasting the reasonableness of the inference under our statute and that arising under Georgia statute (R., 176-179), says:

"It may also be quite true that the mere fact of collision or injury at a grade crossing furnishes no basis for any inference as to whether the accident was caused by the negligence of either party or both or without the fault of any one, for it may have been purely an accident or only avoidable by that infallible prudence, foresight, and judgment with which no human being is endowed, but is the same observation logically applicable to the reverse view of the proposition?

"It certainly will not be questioned that an actual absence of knowledge of an approaching train bears a 'rational connection' between such fact and resulting injury

at a crossing by the same train. Indeed, such fact, regardless of whether the traveler should have known, except in cases of utter heedlessness or irresponsible action, is probably the most fruitful cause of such collisions and injuries. If this be true then it naturally follows that the reason cannot revolt at the assumption of a 'rational connection' between the failure to observe a requirement, amounting to a disobedience of the law, intended solely to give effective knowledge and warning of such approach and the strong probability of resulting injury.

"The likelihood of injury from such cause is not more universally recognized than in the wholesome requirement of the common law, which imposes the duty on railroad companies in perhaps every jurisdiction in the union where that system of jurisprudence obtains (including the State (folio 202) of Mississippi), and regardless of supplementary State and municipal enactments and regulations on the subject, to give to the public and individuals such warning of the approach of trains to public crossing as will guard them against danger in the use thereof. *Miller v. Railroad Company,* 140 S. C., 163.

"The existence of a 'rational connection' between the failure of a railroad company to give adequate warning of the approach of a train to public grade crossing and the great probability of consequent injury to a traveler using the same, forcefully impressed by the facts and circumstances surrounding the present case, is nowhere more emphatically recognized and stated than by the Federal Supreme Court in its discussion in some of the cases of the respective duties and rights of the company and traveler at such crossings, and the presumptions attaching to the conduct of the latter in using the same. *Continental Improvement Company v. Stead,* 95 U. S., 161; *Texas & Pacific Railway Company v. Gentry,* 163 U. S., 353; *Baltimore, etc., Railroad Company v. Landrigan,* 191 U. S., 461.

"In the first case mentioned, the Court speaking on this question, in part, said:

> "If a railroad crosses a common road on the same level, those traveling on either have a legal right to pass over the point of crossing, and to require due care on the part of those traveling on the other, to avoid a collision. Of course, these mutual rights have respect to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop for an approaching wagon to make the crossing first; it is the duty of the wagon to wait for the train. The train has the preference and right of way. **But it is bound to give due warning of its approach,** so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inadvertently in the way. Such warning must be reasonable and timely. . . .
>
> "The right of procedure referred to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with and conditioned upon the duty of the train to give due and timely warning of approach. The duty of the wagon to yield precedence is based upon this condition. . . ."

"In commenting on the presumption that the law presumes that a person approaching a railroad crossing uses care, in the case last cited, the Court used this language:

> "The presumption is founded on a law of nature. We know no more universal instinct than that of self-preservation—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming and death. There are few presumptions, based on human feelings or experience, that have surer foundation than that expressed in the instruction objected to."

"It is, therefore, quite evident that the *Henderson case* is not controlling in this case as it was the absence of such rational connection between the fact proved and the fact to be

inferred—injury and negligence—that furnished the main ground of the decision in that case.

"It may be observed further in connection with this question, and in emphasis of the distinction shown, that the inference of negligence from mere proof of injury is quite a different thing from the proof of both and an inference of causal proximate connection between the two, where one is likely to result in the other.

"While reasoning may not 'lead from the occurrence back to its cause,' yet it will not, and should not, be condemned as arbitrary if it should lead forward from an act of default, or back to it, so likely to result in injury in the light of human experience and observation, as to necessitate, in the interest of the public safety, a legislative preventive measure and a *prima facie* presumption based thereon, as an additional sanction, to such injury. The Georgia statute, repudiated in the *Henderson case*, and the Mississippi statute, approved in the *Turnipseed case*, both lead from injury back but our statute from a likely cause forward and back.

"Even if it were permissible, contrary to the foregoing conclusion, for the presumption under our statute to be considered and weighed as opposing evidence, still the *Henderson case* would be wholly inapplicable for the reason that it was held as the basic ground of that decision that there was no rational connection between a mere proof of collision, in the absence of evidence, and the alleged negligent acts charging the company with legal responsibility therefor, or that either party, or both, was presumed negligent in a given case from the mere fact of the occurrence, whereas under our statute such reasonable connection does exist between the specific fact of failure to give the signals established by the evidence, and the injury, also shown by the evidence, the reasonableness of which is not only confirmed by general experience but as above stated sanctioned by universal judicial recognition."

In fact had our Legislature in express terms created a legal —a conclusive—presumption of proximate cause, predicated upon the failure to give the signals, instead of requiring the

plaintiff to establish such contribution by the evidence, we cannot see how the statute could be nullified as wanting in due process.

Jones v. Brim, 165 U. S., 180.

"The contention that due process of law is denied by giving a retroactive application to Mississippi laws 1912, enacted after happening of an accident, but before trial, making the proof of the happening of an accident give rise to a *prima facie* presumption of negligence, is too devoid of merit to sustain a writ of error to a state Court, where the latter Court held that the statute cut off no substantial defense, but simply provided a rule of evidence controlling the burden of proof."

Easterling Lumber Company v. Pierce, 235 U. S., 380-82.

We come now to notice the last error of appellant in our summary of errors in connection with the due process feature of the attack.

9th. The statute here under attack declares a **rule of liability** that has been adopted as a matter of convenience, and is not a rule of evidence.

We are not so sure that we understand exactly what appellant means by a "rule of liability." The only legal liability that we know anything about as established against defendant by this statute, and it is not peculiar to the statute, is that, **in default of evidence to the main point in issue (proximate cause) the defendant, in a civil case, must lose for the prima facie case is enough as a matter of law.**

Mobile etc., Ry. v. Turnipseed, 219 U. S., 35.

Certainly the case of *Charleston Railroad Company v. Varnville Furniture Company,* 237 U. S., 597, cited by appellant, as authority for this position, does not sustain it. That case is authority for the position "that Congress has so far taken over the subject of a carrier's liability for loss or damage to interstate shipments by the Cormack Amendment that state enactments providing liability against lost carrier upon its

failure to give place of injury to shipment upon demand, etc., are a burden upon interstate shipments."

Congress has not undertaken to legislate on matter covered by statute now under consideration, and hence local statutes will not be interfered with that have a reasonable basis.

We now take up the second reason urged as a denial of due process.

2. By reason of Sections 4903 and 4925, the standard of conduct to be observed by a traveler and a railroad in the use of a grade crossing laid down by the Supreme Court of the United States in *Baltimore & Ohio Railroad Company v. Goodman,* 275 U. S., 66, is not applicable in South Carolina.

We have already admitted that our Courts hold "that it is not the absolute duty of the traveler to stop, look and listen before going on track" (R., 148).

Our Court in *Chisolm v. Railway,* 121 S. C., 401, has laid down in the form of general rules the mutual and reciprocal rights and duties of railroads and travelers upon public crossings in our state, which are at variance with the *Goodman case.*

> "Even if the rule announced in the case of *Baltimore etc., Railroad Company v. Goodman,* 275 U. S., 66, were controlling in this case, it is apparent that a similar conclusion would have to be reached under a reasonable and common sense view of its application. In the latter case, the plaintiff was familiar with the crossing and surroundings. It was evidently a bright day and there does not appear in the record of the case the slightest suggestion of anything in the least calculated to distract his attention. In the case under consideration the day was dark, misty, and cloudy. The plaintiff and her husband were wholly unfamiliar with the crossing and surroundings. Owing to construction and repair work on other highways, one of which would have furnished them a more direct route to his destination they had wandered to an unknown route. These conditions made it necessary for them to take detour routes, the sign of one confronting

them, according to the husband's testimony, not more than thirty feet from the crossing. The two highways referred to intersected upon the railroad right-of-way, all of which naturally created conditions and a mental attitude of inquiry and confusion quite different from that which appears in the *Goodman case.* In the latter case the record does not disclose any evidence whatsoever that Goodman looked or listened for an approaching train. In this case it was positive that both travelers looked and listened as well as they could under the circumstances.

"With an unobstructed view it is difficult to see how an observation made on such a day by the physical act of getting out of the vehicle would have been more effective than one made just thirty feet from and at the crossing. It is not believed that the *Goodman case* in its broadest intended scope of operation would hold the plaintiff in this case to such a degree of culpability as to defeat her action upon the theory that she was directly and proximately responsible for her injury."

We turn now to the other alleged violation of the Fourteenth Amendment.

This Statute, Found in Section 4925 in Connection with Section 4903, Denies Railroads the Equal Protection of the Laws

1. Proof of proximate cause is required in all tort cases except when a railroad is the defendant in a crossing collision case.

We have already admitted that the burden is upon the plaintiff in actions under this statute to prove proximate cause and our Court shows at page 155 of the record that this position is absolutely groundless and need not be further considered.

2. This statute makes the railroad liable for simple negligence, and at the same time declares that the traveler cannot be defeated unless he was guilty of either willfulness or a violation of law.

We might content ourselves with observing, that if "Legislation providing that proof of one fact shall constitute *prima facie* evidence of the main fact in issue is but to enact a rule of evidence, and quite within the general power of government," as applied to the making out of the plaintiff's case in the first instance, as held in the *Turnipseed* or *Mississippi, case, supra,* then it is surely within the general power of government to enact a rule of evidence by which alone the plaintiff's case can be upset. If "statutes, national and state, dealing with such methods of proof in both civil and criminal cases abound, and the decisions upholding them are numerous," as held in *Adams v. New York,* 192 U. S., 586, there certainly cannot be anything in such rules of evidence repugnant to the Fourteenth Amendment.

Bear in mind any affirmative defense, civil or criminal, must be proved by a preponderance of the testimony at common law, so why should there be anything so objectionable in a statute, designed to enforce care and preserve the lives of the public, that requires just a little higher degree of contributory negligence to defeat plaintiff's action?

If the Legislature believes the giving of these signals so important to the safety of the citizen that a railroad may be indicted and fined for a failure to give them, where is the injustice in requiring this higher degree of proof to escape on the civil side of the Court as a penalty for its delict?

In considering the due process feature we have pointed out that this rule of evidence under the statute was predicated upon the necessities of the case (*Drennan v. Railway, supra*). A similar question to the one now being considered was also presented to the Court in the *Drennan case,* and disposed of in this language:

> "The rule as to classification, under the Fourteenth Amendment to the Federal Constitution, is thus clearly stated by the Court, through Mr. Justice Van Devanter, in the case of *Lindsley v. Natural Carbonic Gas Co.,* 200 U. S., 61:

"'1. The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done, only when it is without any reasonable basis, and, therefore, is purely arbitrary. 2. A classification having some reasonable basis, does not offend against that clause merely because it is not made with mathematical nicety, or, because in practice, it results in some inequality. 3. When the classification in such a law, is called in question, if any state of facts reasonably can be conceived, that would sustain it, the existence of that state of facts, at the time the law was enacted, must be assumed. 4. One who assails the classification in such a law, must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.'

"Section 2139 (now Sec. 4925) of the Code of Laws, was the outgrowth of the necessity for legislation, to protect the traveling public, at highway crossings, and it is peculiarly applicable to railways—in fact, it is difficult to conceive, how any but railways, could be included in the classification. This case, therefore, is embraced within the principles, announced in the case last mentioned."

It seems to us that the underlying principle here is the same that appears in the Act of Congress, approved the 11th of June, 1906, which provides that in all actions brought against common carriers, to recover damages for personal injuries to an employee, or where such injuries have resulted in death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, where his contributory negligence is slight, and that of the employer was gross, in comparison, but the damages shall be diminished by the jury, in proportion to the amount of negligence, attributable to such employee.

Each company under this statute is subject to the same liability, and from each the same security as to giving signals is required. There is no evasion of the rule of equality, where all

companies are subjected to the same duties and liabilities under similar circumstances.

St. Louis, etc., Railway Co. v. Matthews, 165 U. S., 1.

We will next take up:

2. That statute is not applicable to the engineer, through whom the railroad alone acted.

Were it necessary, we might take the position here that this action is for the joint and concurring act of the railroad and the engineer, and by putting in a joint answer with railroad, although not within the terms of the statute, the engineer subjected himself to the proof of the higher degree of contributory negligence in exculpation. But we admit the engineer, notwithstanding this fact, still has all his common law defenses to the failure to give signals, as has the railroad to all the common law allegations in the complaint. The inequality urged by appellant is, "that the railroad has no action over against the engineer who caused the collision, and must stand and deliver while the engineer goes free.

We might remark that the engineer didn't go free in this case, the verdict being against both, but in taking this position appellant surely overlooked the cases of *Jenkins v. Railway Company,* 130 S. C., 180; *Johnson v. Railway Company,* 142 S. C., 125, and *Cannady v. A. C. L. Railway Company,* 164 S. E. R., 237, which are authority for saying "that where the master is held liable for the tort of the servant, the master has right of action to recover from the servant the damages he has been called upon to pay."

Appellant says "the fact that the railroad company can act alone through its engineer with respect to a crossing accident and be held liable under this statute, while the engineer cannot be held liable at all under the statute, but the case against him must be under the common law where all of his defenses are still available, while under the statute common law defenses in favor of the railroad company are cut off, is such a gross discrimination that Judge Shipp, in his concurring opinion (R., page 216), in effect stated that this of itself was such a

vice in the statute as to render it unconstitutional if it had not been open to any other objection."

Had the *Cannady case, supra,* been out at the *en banc* Court hearing, Judge Shipp might not have taken the position he did. However, the cases of *Powell v. Southern Railway,* 110 S. C., 70, and *Atlantic Coast Line Railroad Company v. Feaster* (D. C.), 260 Fed., 881-2 were out, and Judge Shipp and appellant are simply mistaken, as the following language of Judge H. A. M. Smith, the then District Judge for the Eastern District of South Carolina, shows:

> "The position of the Atlantic Coast Line Railroad Company is that the statute known as the Employers' Liability Act, passed by the State of South Carolina, on the 14th day of April, 1916, supersedes all law relating to the relations of employer and employee in a case such as this, where the employer is a common carrier by railroad, and the right of the employee to recover depends entirely upon the terms of that act; whereas, his right to recover as against the other defendant, R. S. Jones, depends entirely upon the common law, making both employer and employee liable to the party injured in a case of injury caused by joint negligence; for this Court cannot in the same cause administer a different rule as to liability to different defendants, the one being the liability imposed by the common law and the other being the rule as to liability imposed by the Employers' Liability Act.
>
> "There are some aspects in which this position would appear to be logical and reasonable and there are decisions of respectable Courts supporting it; but the Supreme Court of South Carolina, in the case of *Powell v. Southern Railway Company,* 110 S. C., 70, 96 S. E., 292, decided on the 5th day of April, 1918, had decided explicitly that, although a railroad company may be liable as an employer under the Act of Congress entitled 'Employers' Liability Act' (Act April 22, 1908, c. 149, page 65 (45 U. S. C. A., 51-59), the language of the South Carolina statute being the same, while the other defendant in that case may be

liable under common law, yet that where the complaint alleged that the transaction was one and that both the defendants had concurrent part in the transaction, it did not matter that the law casts upon each defendant a different duty thereabout; that that consideration does not separate them in the performance of the same act, and that the complainant had a right to allege the existence of a joint tort, and to recover upon the tort as a joint one, although a different measure of liability might be imposed by the Court upon the separate defendants; that although a different rule of law would be applied as measuring the liability of the two separate defendants, that would not be sufficient to change the general character of the tort and convert the right against each defendant into a separable one."

Let us not forget the rules laid down by Justice Van Devanter in *Lindsley v. Natural Carbonic Gas Company, supra,* in the consideration of this question, the second and fourth of which we repeat here:

2. A classification having some reasonable basis, does not offend against that clause (Equality clause), merely because it is not made with mathematical nicety, or, because in practice it results in some inequality.

4. One who assails the classification in such a law (police law), must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

A classification requiring the registration of physicians and surgeons by a Maryland statute, applicable in terms only to those engaged in practice prior to a certain date, an exemption from operation under stated conditions of certain resident and non-resident physicians, was not unreasonable and arbitrary.

Watson v. State of Maryland, 218 U. S., 173.

Chief Justice Gary in *Drennan v. Railway, supra,* after pointing out the necessity for this legislation, and it being peculiarly applicable to railroads, said: "In fact, it is difficult to conceive, **how any but railroads,** could be included in the classification."

We take up now:

3. This statute is not applicable to all common carriers involved in the identical transaction. (The presumed discrimination here is because all motor vehicles are not also subject to its provisions.)

We have never before heard that there was doubt that if a bus runs into a railroad train, or a street car into a train that the railroad could not recover for any injury done its property. In fact, the writer of this brief recalls a case tried in his county, in which he represented the railroad, and in which, **to a suit under this statute** he set up a counterclaim for injury to the engine of the railroad by the traveler, and who was not incorporated even.

A complete and satisfactory answer to this view is found in the case of *McCutcheon v. Railway Company,* 81 S. C., 74, where our Court, quoting with approval from the cases of *Johnson et al. v. Spartan Mills,* 68 S. C., 339, and *Simmons v. Tel. Co.,* 63 S. C., 430, said:

> "Legislation is not unequal or discriminatory in the sense of the equality clause of the Constitution merely because it is special or limited to a particular class. The decisions of the United States Supreme Court established that the Legislature has power to make a classification of persons and property for public purposes, provided such classification is not arbitrary and bears reasonable relation to the purpose to be effectuated, and the equality clause is not violated when all within the designated class are treated alike.
>
> "A classification may be reasonable which, for certain purposes, imposes liability upon a railroad as distinguished from other common carriers. *Ry. v. Mackey,* 237 U. S., 295; *St. Louis, etc., Ry. Co. v. Matthews,* 165 U. S., 1."

We will now consider the third and last ground of attack upon this statute:

II. Sections 4903 and 4925 of Volume 3 of the Code of Laws of South Carolina, 1922, as construed by the Supreme

Court of South Carolina, violate the interstate commerce clause of the Federal Constitution and are therefore void.

The termini of this particular train, Charleston and Greenville, the roadbed with its rails lies wholly within the State, it nowhere crossing the State line, and the testimony that it was engaged in interstate commerce was very flimsy indeed; "but assuming that the appellant's train was, at the time and place of respondent's injuries on said public highway crossing, engaged in interstate commerce (*Gladson v. Minnesota,* 166 U. S., 427; *International, etc., Company v. Pigg,* 217 U. S., 91; *Galveston, etc., v. Railroad Company,* 254 U. S., 357), it is well settled by numerous decisions of the Federal Supreme Court that in the absence of Congressional enactment on the subject, the states are not denied the power to promote by legislative enactment safety in the physical operation of railroad trains within their territory, even though engaged in interstate commerce, provided such requirements are not "arbitrary; or pass beyond a fair judgment of what the exigency demands." *Southern Railway Company v. King,* 217 U. S., 524; *Atlantic, etc., Railroad Company v. Georgia,* 234 U. S., 280.

> "It is also well settled that in the absence of congressional enactment or a valid and controlling regulation of the Interstate Commerce Commission, under its congressional grant of power on the subject, and no such act or regulation has been brought to our attention, the police power of the State can be validly exercised on many occasions to insure the faithful and prompt performance of duty within its limits on the part of those engaged in interstate commerce and that the exercise of such power is in aid of interstate commerce and does not burden it though incidentally affecting it. *Railway Company v. Mazursky,* 216 U. S., 222; *Telegraph Company v. Jones,* 162 U. S., 650; *Telegraph* (folio 212) *Company v. Milling Company,* 218 U. S., 406; *Missouri, etc., Railroad Company v. Larabee Mills,* 211 U. S., 612; *Railway Company v. Reid,* 222 U. S., 424; *Stone v. Loan and Trust Company,* 116 U. S., 304; *Smith v. Alabama,* 124 U. S., 465; *Hennington*

v. Georgia, 163 U. S., 299; *New York, etc., Railroad Company v. New York,* 165 U. S., 628; *Gladson v. Minnesota,* 166 U. S., 427; *Smith v. Alabama,* 124 U. S., 465.

"In the course of an able and elaborate opinion by that venerable and able jurist, Mr. Justice Holmes, in the case of *Erie Railroad Company v. Board of Public Utility Commissioners,* 254 U. S., 394, in which the city of Patterson in promotion of the public safety undertook to require the railway company to separate grades at a number of crossings at a great expense, and in which the usual defenses of violation of the due process of law, equal protection of the law, contract impairment, privilege and immunity abridgment and interstate commerce clauses of the Federal Constitution were invoked, said, in part, in response to the last contention:

"If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil. *Denver & Rio Grande R. R. Co. v. Denver,* 250 U. S., 241, 244, 39 S. Ct., 450; 63 L. Ed., 958; *Union Dry Goods Co. v. Georgia Public Service Co.,* 248 U. S., 372, 39 S. Ct., 117, 63 L. Ed., 309, 9 A. L. R., 1420; *Louisville & Nashville R. R. Co. v. Mottley,* 219 U. S., 467, 31 S. Ct., 265, 55 L. Ed., 297, 34 L. R. A., (N. S.), 671; *Northern Pacific Railway Co. v. Duluth,* 208 U. S., 583, 28 S. Ct., 241, 52 L. Ed., 630; *Manigault v. Springs,* 199 U. S., 473, 480, 26 S. Ct., 127, 50 L. Ed., 274. If the burdens imposed are so great that the road cannot be run at a profit, it can stop, whatever the misfortunes the stopping may produce. *Brooks-Scanlon Co. v. Railroad Commissioners,* 251 U. S., 396, 40 S. Ct., 183, 64 L. Ed., 323."

In the case of *Smith v. Alabama, supra,* Mr. Justice Matthews, delivering the opinion of the Court, in part, said:

"It is to be remembered that railroads are not natural highways of trade and commerce. They are artificial crea-

tions; they are constructed within the territorial limits of a State, and by the authority of its laws, and ordinarily by means of corporations exercising their franchises by limited grants from the State. The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the State. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill, and care. The safety of the public in person and property demands the use of specific guards and precautions. The width of the gauge, the character of the grades, the mode of crossing streams by culverts and bridges, the kind of cuts and tunnels, the mode of crossing other highways, the placing of watchmen and signals at points of special danger, the rate of speed at stations and through villages, towns, and cities, are all matters naturally and peculiarly within the provisions of that law from the authority of which these modern highways of commerce derive their existence. The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution."

The case of *Gladson v. Minnesota,* 166 U. S., 427, is so nearly on all fours with the case at bar that we think it conclusively settles the point against appellant and we quote liberally from it.

In this case a statute of the state required every railroad corporation to stop all regular passenger trains, running wholly within the state, at its stations at all county seats long enough to take on and discharge passengers with safety.

"On the afternoon of July 2, 1893, the complainant was a passenger on a train of the company running from St. Paul to Duluth, and held a ticket for a passage from Rush City to Pine City, both being stations on the line between St. Paul and Duluth, and Pine City being a village of eight hundred inhabitants and the county seat of Pine County; but, although he showed his ticket to the conductor, the train was not stopped at Pine City. The train was a fast express train, known as 'the limited,' carrying passengers and the United States mail, running daily from St. Paul to Duluth only, stopping for wood and water at Hinckley, and at railroad crossings and junctions at Rush City and elsewhere, but not scheduled to stop at Pine City or other stations on the way. The mail, and about one-third of the passengers, on the average, were destined for West Superior, and were transferred at West Duluth in the State of Minnesota to another train of the same company running thence to the city of West Superior in the State of Wisconsin, just across the line between the two states. To have stopped the train at Pine City would have caused a loss of time of from five to seven minutes, and an expense of from $1.25 to $1.60. Two passenger trains and a mixed train passed daily each way over the road from St. Paul to Duluth, stopping at Pine City."

The engineer was indicted and convicted.

"The defendant, as stated in his bill of exceptions moved the Court for his discharge, on the ground that the statute under which the complaint is made is unconstitutional on its face, not falling within the legitimate scope of the police power of the state, consequently being a taking of the property of this railroad company without due process of law; that, even if it is not unconstitutional on its face, it is unconstitutional as applied to the train in controversy; in the first place, being an attempt on the part of the State to regulate interstate commerce; and secondly, being an unlawful interference with and an attempt to regulate the United States mail."

The Court held: "That such requirement was a reasonable exercise of the police power of the state, and does not take property of the company without due process of law; nor does it, as applied to a train connecting with a train of the same company running into another state, and carrying some interstate passengers and the United States mail unconstitutionally interfere with interstate commerce, or with the transportation of the mails of the United States."

CONCLUSION

"If the statute be, as held in the *McBride case,* one of regulation 'for the prevention of accidents and concerning the responsibility therefor'; if the 'Legislature evidently had in mind that injury to person or property was very likely to occur at a railroad crossing unless proper warning of the approach of trains was given to travelers, and intended by the statute to prevent such injury by requiring the railroad to give certain definitely described signals'; if the presumption as defined attaching to the proof of failure to comply therewith 'affords only an additional sanction to the provision requiring such signals to be given and an inducement to compliance with such requirement,' then it is quite certain that the statute is clearly sustained under a valid exercise of the police power of the state and otherwise provides due process of law as against the objections urged in full conformity with the guarantee of the Federal Constitution as construed by the Federal Supreme Court and our own decisions.

"As the statute imposes the prescribed duties on 'each locomotive engine or interurban car' whose track is crossed by a public highway, street or traveled place; exacts from each the same security in the interest of the public safety; relates to all persons using the latter at such designated places and subjects the company to the 'same duties and liabilities under similar circumstances,' we are at a loss to conceive wherein the statute is violative of any phase of

the equal protection of the law clause of the Federal Constitution upon the grounds stated.

"The jury were fully instructed on the essentials of the action, the issues involved, negligence, contributory negligence and willfulness, the respective duties of the company and traveler, under the statute and at common law, upon approaching a highway crossing, the burden of proof resting on each and the basis and measure of damages, in the course of which they were specifically instructed that it was 'not every negligence which subjects one to payment of damages' but that 'it is necessary to show that negligence was the proximate cause of the injury complained of'; that under the statute the plaintiff must not only prove the failure to give the signals but the causal connection between such failure and the alleged injury and must prove 'both by the preponderance of the evidence'; that while a presumption of proximate cause arises from a failure to give the signals, such presumption is and would be rebuttable by evidence and the jury should consider any and all evidence that may be in the case in determining the question of proximate cause'; that there was a presumption of innocence in favor of the company with regard to the violation of the statute and that the 'burden is on the plaintiff of proving that the statute was violated.'"

The case having been fairly tried and the appellant given the benefit of all the law applicable to the issues, none of it infringing the constitutional provisions referred to, we believe this Court should, and will sustain the judgment of the State Court and dismiss the appeal.

Respectfully submitted,

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